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No. 91-666

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NORMAN W. SWANSON, *et al.*,
Petitioners,

v.

HELEN A. POWERS, Secretary of the
North Carolina Department of Revenue, *et al.*,
Respondent.

Petition for a Writ of Certiorari to
The United States Court of Appeals
for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Was the law so "clearly established" prior to this Court's decision in *Davis v. Michigan* that a lay public official must have known that the enforcement of a long-standing state income tax exemption for state retirees would violate the federal constitutional or statutory rights of federal pensioners?

2. Did former Secretary Powers violate the clearly established federal constitutional rights of petitioners when -- upon the advice of the State Attorney General -- she enforced, and declined personally to override, a 50-year old state tax refund statute that had been upheld by the North Carolina Supreme Court?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners are a class of federal pensioners (Class A) and federal military reservists and active duty personnel (Class B) who have asked this Court to review the opinion of a unanimous panel of the Fourth Circuit United States Court of Appeals upholding Respondent Helen Powers' defense of qualified immunity.

A. Proceedings in the District Court.

The retirees filed suit on April 14, 1989, shortly after this Court declared unconstitutional the income tax statutes of some 23 states in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (March 28, 1989). North Carolina, like Michigan and a host of other states, fully exempted from state income tax retirement payments to former state employees, but granted

only a partial exemption to federal civil service retirees. After *Davis* was decided, the North Carolina General Assembly changed its revenue statutes to equalize the treatment of federal and state retirees. This revision, which allotted each group of retirees an exemption of $4,000, took effect on January 1, 1989. *See* N.C.G.S. § 105-134.6(b)(6)a (1990).

In their suit, petitioners sought a refund of their state income taxes for the tax years 1985-1988, the four years prior to the *Davis* decision. Petitioners alleged that North Carolina's statute was unconstitutional because its disparate taxing scheme violated the doctrine of intergovernmental tax immunity and the Public Salary Tax Act of 1939. JA 10, 21-22 * Petitioners also asserted an equal protection and due process challenge to North Carolina's former statute, relying on the jurisdictional grant in 42 U.S.C. § 1983. JA 22.

Petitioners sued Helen A. Powers, formerly Secretary of the North Carolina Department of Revenue in her individual capacity.[1] JA 6a, 9. They contended that Secretary Powers, by discharging her constitutional duty to enforce the revenue laws of North Carolina, became personally liable to pay the plaintiff class over $140,000,000, an amount petitioners say represents

* "JA" citations are to the Joint Appendix presented in the Fourth Circuit Appeal. "App." citations are to the appendices to the petition to this Court.

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1 Plaintiffs initially sued Secretary Powers in both her official and individual capacities. JA 6a. Following her resignation from her office in April 1990, plaintiffs substituted her successor as a defendant. *See* F.R. Civ. P. 25 (d) (1). JA 5. Ms. Powers remains in this action solely in her individual capacity.

federal retirees' state income tax liability for the limitations period they maintain is applicable. JA 11.

Following an amendment to their complaint which added another class of claimants,[2] Secretary Powers and her co-defendants moved to dismiss the amended complaint. JA 57. In particular, Secretary Powers moved to dismiss the damages claims filed against her, arguing that the doctrine of qualified immunity protected her from the claims advanced in this suit.

The district court rejected, however, the qualified immunity defense posed by Secretary Powers, who had since left her office to return to private business. The district court found that Secretary Powers should have "anticipated" the *Davis* decision. Declaring that "the doctrinal underpinnings of *Davis* are long-standing principles," App. B 26a, citing *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the district court opined that "*Davis* was inevitable" and that state officials (in this case Ms. Powers) "should not be allowed to continue blatantly unconstitutional conduct until the courts specifically rule it unconstitutional." *Id.*

B. Proceedings in the Court of Appeals.

Pursuant to the principles articulated in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), Secretary Powers perfected an interlocutory appeal of the district court's decision denying her the protection of qualified immunity. Following full briefing and oral argument, the Fourth Circuit handed down an opinion that begins with this sentence:

> Helen Powers, former Secretary of Revenue for the State of North Carolina, faces potential liability of $140 million for her actions in enforcing the state revenue code.

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2 The Class B claimants were not federal retirees, but active-duty military personnel and reservists, who challenged North Carolina's $1,500 annual income tax exclusion for North Carolina National Guard compensation. JA 9-10.

App. A 2a.

The Court of Appeals addressed each feature of the argument petitioners rely upon in this Court. Specifically, the Court of Appeals recognized that "Secretary Powers was enforcing a long-standing statute . . . similar to enactments elsewhere," that "the most pertinent judicial decisions had upheld comparable taxing schemes," and that "the doctrine of intergovernmental tax immunity was, at best, ambiguous." *Id.* 6a-7a. Thus, with respect to the first question petitioners now have presented to this Court, the Court of Appeals concluded: "[w]e decline to proclaim in hindsight after the *Davis* decision that the unconstitutionality of differential tax exemptions had been clear all along." *Id.* 7a.

Second, the Court of Appeals analyzed the petitioners' contention below -- presented here as their second question -- that Secretary Powers did not accord them an adequate post-deprivation remedy for the unconstitutional taxation because, so they argued, she had applied a 30-day refund demand requirement "without prior notice and contrary to established official practice and advice." *Id.* 13a. As the Court of Appeals explained, however, it was a decision of the North Carolina legislature, and not a matter of any Revenue Secretary's whim, that each taxpayer demand a refund within 30 days of paying taxes. *Id.* Further, the Court of Appeals concluded that "some minimum of notice" of this demand requirement must have been provided to petitioners as the result of the presence of the requirement on North Carolina's statute books for approximately 50 years. *Id.* With respect to petitioners' assertion, now repeated in this Court, that the demand requirement was "contrary to her Department's official bulletins and instructions," the Court of Appeals pointed out petitioners' misreading of these materials:

> [T]he bulletins clearly state in their preface that *they 'do not cover all phases of the law.'* In fact, only the refund procedures under N.C. Gen. Stat. § 105-266 for routine overpayments due to miscalculation are discussed; the bulletins do not mention N.C.

> Gen. Stat. § 105-267, which applies to refunds of unconstitutional taxes.

Id. 14a (emphasis added).

Finally, the Court of Appeals evaluated the contentions of the Class B claimants, the active duty federal military personnel and reservists. Because North Carolina National Guard members had received an annual tax exemption of $1,500, the Class B claimants, who received no exemption, alleged they were victims of discrimination at Secretary Powers' hands. Drawing on the reasoning of *Davis* that found "coextensive" 4 U.S.C. § 111 and the prohibition against discrimination as embodied in intergovernmental tax immunity, the Court of Appeals focused on § 111's sole proscription of discrimination as between employees compensated *by the same source*. *Id.* 15a. It was unnecessary, in the Court of Appeals' view, to reach the constitutional merits of the Class B claims. Inasmuch as the paychecks for both the Class B claimants and the National Guardsmen were drawn on the United States Treasury, "it is at least arguable that an exemption for one of those groups creates no constitutional violation." *Id.* 16a. Accordingly, the Court of Appeals determined that Secretary Powers was shielded by qualified immunity from the Class B members' claims. *Id.*

REASONS FOR DENYING THE WRIT

This case is not a proper case for allowing the writ of certiorari. Petitioners fail to identify the presence of a single factor typically required by this Court in deciding to allow this writ. The panel's decision was unanimous, and petitioners' petition for rehearing was denied without comment. The panel's decision comports with what must be regarded as a mainstream, common-sense evaluation assuring that qualified private citizens will be willing to offer themselves for public service. Moreover, petitioners have not pointed to any decision by any other Court of Appeals -- or, for that matter, by any other court at all -- with which the Fourth Circuit's decision conflicts. *Cf.* Supreme Court Rule 17.1(a). Finally, petitioners fail to develop any substantial argument that the Court of Appeals

either has decided "an important question of federal law [which] should be settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court." *Id.* 17.1(c). In summary, petitioners do not present any solid basis for this Court to accept this case for plenary review.

I. *Petitioners Have Not Demonstrated Any Sound Basis To Strip Secretary Powers of the Protection of Qualified Immunity.*

When Helen Powers took the oath of office as Secretary of the Department of Revenue for the State of North Carolina, she swore to enforce the state's revenue laws. *See* N.C.G.S. § 128-5. Those laws required her to collect income taxes from federal employees and not to refund them absent a valid demand within 30 days of payment. *Id.* § 105-267. The income tax exemption for state and local retirees, assailed by petitioners as violating "clearly established" constitutional and statutory rights, had been a part of North Carolina's revenue laws for nearly 50 years.[3] Although declaring that "a conscientious evaluation of [North Carolina's] statutory scheme" would have led Secretary Powers to recognize the invalidity of those stat-

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3 Exemptions similar to North Carolina's existed in some 23 states. *See* Ala. Code §§ 36-27-28 and 40-18-19 (Supp. 1988); Ariz. Rev. Stat. Ann § 43-1022 (Supp. 1988); Colo. Rev. Stat. § 39-22-104(4)(f) and (g) (Supp. 1988); Ga. Code Ann. § 48-7-27(a)(4)(A) (Supp. 1988); Iowa Code Ann. § 97A.12 (West 1984); Kan. Stat. Ann. § 74-4923(b) (1985); Ky. Rev. Stat. Ann. § 16.690 (Michie/Bobs-Merrill Supp. 1988); La. R.S. 42:545; 47.44.1 (Supp. 1989); Md. Tax-Gen. Code Ann. § 10-270(o) (1988); Mich. Comp. Laws Ann. § 206.30 (1988); Miss. Code Ann. §§ 21-29-51 and 25-11-129 (1972); Mo. Rev. Stat. §§ 86.190 and 104.540 (1986); Mont. Code Ann. § 15-30-111(2) (1987); N.M. § 135-9 (1988); Okla. Stat. § 68-2358 (1988); Ore. Rev. Stat. § 316.680(1)(c) and (d) (1987); S.C. Code § 12.7-435(a), (d) and (e) (Supp. 1988); Utah Code Ann. § 49-1-608 (1989); Va. Code § 58-322(c)(3) (Supp. 1988); W. Va. Code § 11-21-12(c)(5) and (6) (Supp. 1988); Wis. Stat. § 71.05(a)(a) (Supp. 1988).

utes (Pet. 15), petitioners do not mention, much less detail, what Secretary Powers would have been required to evaluate. Notably, petitioners completely ignore the only decision on point prior to this Court's decision in *Davis v. Michigan*, 489 U.S. 803, 109 S.Ct. 1500 (1989). That decision was the opinion of the Michigan Court of Appeals evaluating a tax structure almost identical to North Carolina's. Michigan's appellate court had held, consistent with the analysis of the Michigan Court of Claims, that the tax exemption for state and local retirees was a proper exercise of legislative judgment and fully constitutional. *Davis v. Michigan Dept. of Treasury*, 408 N.W. 2d 433 (Mich. App. 1987). Indeed, when this Court decided *Davis*, Justice Stevens dissented, reasoning that the majority opinion was "unjustified" and "not supported by the rationale for the intergovernmental immunity doctrine." *Davis*, 109 S.Ct. at 1509. In addition, but also not mentioned by petitioners, a retirement tax scheme closely analogous to Michigan's and North Carolina's had survived an equal protection challenge in Arkansas six years prior to the *Davis* decision by this Court. *Streight v. Ragland*, 655 S.W. 2d 459 (Ark. 1983).

Secretary Powers does not suggest that this Court should reevaluate its *Davis* analysis or reverse that decision. Rather, she maintains that the principle established in *Davis* was not "clearly established" before that decision. For that fundamental reason, evaluated thoroughly by the Fourth Circuit in this case, respondent was entitled to the protection of qualified immunity. Upholding the Fourth Circuit's recognition of qualified immunity for Secretary Powers would be fully consistent with this Court's several expressions on this subject:

> Our cases have accommodated . . . conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.

Anderson v. Creighton, 483 U.S. 635, 638 (1987). A year earlier, this Court reasoned that qualified immunity protects "all

but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). *See also Mitchell v. Forsyth*, 472 U.S. at 528, holding that public officials are immune unless "the law clearly proscribed the actions they took."

It is totally unreasonable to have expected a public official to have known, prior to this Court's March 1989 decision in *Davis*, that enforcement of the long-standing tax exemption for state and local retirees violated the doctrine of "intergovernmental tax immunity." Accordingly, even if the sole standard for issuing a writ of certiorari was evaluating the Fourth Circuit's decision for error, this Court should deny the petition in this case.

Rather than addressing the actual legal landscape surrounding the tax exemption at issue in this case, petitioners seek to rely on a list of "pre-*Davis* facts" presumably indicating what Secretary Powers should have recognized as signals of illegality. Pet. 4-6. Nowhere in petitioners' list, however, does one court decision evaluating tax exemptions appear. Instead, petitioners' "facts" are an assortment of taxpayer complaints, the report of a study commission evaluating the fairness of the tax differential, a half-century old attorney general's opinion declaring that the "Public Salary Tax Act of 1939 gives the consent of Congress to non-discriminatory state taxation of the compensation of federal employees," (J.A. 254), and a cryptic statement appearing in a 1941 law review article concerning the validity, under state constitutional principles, of certain tax exemptions. The most that can be said for petitioners' pre-*Davis* list of facts is that it formed a basis for debating or litigating whether the tax exempt structure in North Carolina and many other states was valid. To infer from these "facts," however, that Secretary Powers should have concluded, under pain of staggering personal liability, that she must violate her oath and either reformulate or decline to enforce North Carolina's tax laws is erroneous. In essence, petitioners would have Secretary Powers unilaterally refund taxes in direct violation of state law on the strength of her prediction that this Court

would announce the constitutional principle it announced in *Davis*. Demanding such a course of action by public officials would create an intolerable burden petitioners do not begin to evaluate. Indeed, as this Court has observed, public officials are simply not charged with predicting the future course of constitutional law. *Pierson v. Ray*, 386 U.S. 547, 557 (1967); *see also Thorne v. City of El Segundo*, 802 F.2d 1131, 1140 (9th Cir. 1986).

1. A Public Official's Enforcement of a Presumptively Valid State Statute Should Not Give Rise to a Claim Against That Official for Monetary Damages.

As a leading reason for granting the writ in this case, petitioners insist that "revenue officials should not be allowed to hide behind legislative enactments "which *they contend* to be 'presumptively valid,' . . . ." Pet. 15. (emphasis added). Indeed, petitioners insist that a conscientious evaluation of the statutory scheme in this case would have negated the presumption of validity. *Id.* In so contending, petitioners ignore that it is this Court that has declared that all state statutes are *presumed* to be constitutional. *New York State Club Assoc. v. City of New York*, 487 U.S. 1, 17 (1988). Accordingly, and as this Court also has reasoned, "state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful." *Lemon v. Kurtzman*, 411 U.S. 192, 209 (1973). Likewise, this standard presumption is actually enhanced when state revenue laws are concerned: "where a tax measure is involved, the presumption of constitutionality is strongest." *Simanco, Inc. v. Dept. of Revenue*, 57 Wis. 2d 47, 54, 203 N.W. 2d 648, 651, *appeal dismissed*, 414 U.S. 804 (1973). Further, but also ignored by petitioners, "the paradigm of 'reasonable grounds' for a good faith belief in the propriety of official action is reliance on a state statute later declared unconstitutional." *Landrum v. Moats*, 576 F.2d 1320, 1327 n. 14 (8th Cir.), *cert. denied*, 439 U.S. 912 (1978). *Accord Vela v. White*, 703 F.2d 147, 152-53 (5th Cir. 1983); *Barker v. Norman*, 651 F.2d 1107, 1125 (5th Cir. 1981).

Also omitted from consideration by petitioners is the principle that a state administrative department -- or the head official of that department -- fundamentally lacks the power to declare a state statute unconstitutional. Under our system of government, the question of constitutionality of a statute is for the judicial branch. This Court has so recognized: "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Johnson v. Robison*, 415 U.S. 361, 368 (1974). In summary, petitioners' call for a "conscientious evaluation" of the law actually overlooks two features critical to any such evaluation: this Court's rationale for the presumption that state statutes are constitutional and the constraints inherent in our system of government limiting the powers of the executive branch.

2. Petitioners Fail To Frame Correctly the Qualified Immunity Inquiry Applicable to This Case.

As though repetition of the proposition would establish it, petitioners make a series of assertions that the application of intergovernmental tax immunity in this context was well-established before *Davis*. Pet. 15, 17, 18 [*Davis* followed "clear precedent . . ."], 19 [*Davis* conclusion "predictable and obvious"; also "*Davis* . . . simply one more application of the clearly established constitutional principle that discriminatory taxes are unconstitutional."] To the extent these assertions rely on the notion of "discriminatory taxation," they only beg the question what might have been "clearly established" in the law. Beyond any doubt, the actual focus of *Davis* was not whether the Michigan taxation scheme was discriminatory, but whether the discrimination was legally permissible. And, to the extent petitioners marshall any authority evaluating intergovernmen-

tal tax immunity, they fail to provide precedent suggesting the conclusion in *Davis* was either predictable or obvious. Specifically, petitioners rely in this petition, as they did below, on a variety of cases that *upheld*, in many instances, the tax under focus.[4] Indeed, as pointed out by the Fourth Circuit, the "vast majority of plaintiffs' cited cases held that the challenged taxes *were constitutional*." App. A 10a (emphasis added), referring to Justice Stevens' dissent in *Davis* and to *United States v. County of Fresno*, 429 U.S. 452, 462 (1977), where this Court concluded that a tax would not violate the doctrine of intergovernmental immunity "so long as the tax is imposed equally on the other similarly situated constituents of the State."

Throughout their discussion of what Secretary Powers should have known about "clearly established" principles, petitioners do not -- because they cannot -- cite a single decision before *Davis* even interpreting the actual provisions of 4 U.S.C. §111 since Congress had passed it in 1939. Petitioners choose instead to lift several portions of passages from *Davis*, italicize them, and then advance these emphasized passages to conclude that the *Davis* result was so certain to occur that Secretary Powers must forfeit qualified immunity for failing to see it coming. Pet. 19. In so contending, petitioners speak of broad concepts, such as the "*nondiscriminatory component of the constitutional immunity doctrine*" (*id.*) and "intergovernmental tax immunity as a *settled rule*." *Id.* (emphasis by petitioners).

These and petitioners' related arguments indicate a flawed characterization of the constitutional right at issue, one too abstract to give content and meaning to the protection qualified immunity was designed to provide. Intergovernmental tax immunity was a "clearly established" doctrine when Secretary Powers took office, as were the rights of free speech,

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4 *See, e.g.*, petitioners' reliance on three Supreme Court cases involving state or federal employees -- all upholding tax . Pet. 18-19 at n. 43, *citing Helvering v. Gerhardt*, 304 U.S. 405 (1938), *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939), *United States v. County of Fresno*, 429 U.S. 452 (1977).

free press, and due process. By no means, however, were the "contours" of intergovernmental tax immunity and the Public Salary Tax Act established, certainly not as applied to a state income tax exemption for state pensioners. Yet, those contours are the relevant ones for the qualified immunity analysis demanded here. As this Court said in *Anderson*: "our cases [have] establish[ed] the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense" so as to inform the official that " . . . in the light of pre-existing law, the unlawfulness [of his conduct] *must be apparent*." 483 U.S. at 640. (emphasis added). Although referring to this pertinent passage from *Anderson*, petitioners refuse to identify what in the "pre-existing" legal landscape would have demonstrated to anyone the "apparent unlawfulness" in enforcing a tax scheme on North Carolina's statute books for nearly a half century that had not met with a single courtroom challenge. For petitioners to decry "violation of constitutional and congressional mandates" (Pet. 21) does not alter the fundamental reality that no legal precedent could have alerted Secretary Powers that the retiree taxation scheme in North Carolina violated the constitutional or statutory rights of anyone.[5]

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5 Respondent has no difference with the opinions from the Third and Ninth Circuits on which petitioners attempt to rely. Pet. 20. In *Hicks v. Feeny*, 770 F.2d 375 (3rd Cir. 1985), the Court declared that if applicable legal principles are found "uncertain," the public official should be granted immunity "as unexpected monetary damages could unfairly force officials to guess the development of constitutional law." *Id.* at 380. Likewise, in *Brady v. Gebbie*, 859 F.2d 1543 (9th Cir. 1988), the Court was able to detail a substantial body of legal precedent recognizing the right to a "liberty interest hearing" that had been denied to a discharged plaintiff. 859 F.2d at 1555-56. Petitioners do not even attempt to build a substantial comparison of the precedent actually available in *Brady* to the precedent available to Secretary Powers.

In sum, petitioners' attempt to find support in a variety of tax cases, including *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), does not avail them in supplying pertinent "existing law." Pet. 19. It is no answer to the qualified immunity defense in this case to advance intergovernmental tax immunity as grounded in an 1819 Supreme Court decision any more than it is to observe that due process has roots in the Magna Carta.

II. *Petitioner Class B Claimants Can Point to No Discrimination vis-a-vis the North Carolina National Guard.*

Petitioners' argument in behalf of federal military reservists and active duty personnel simply fails to confront the plain terms and obvious import of 4 U.S.C. § 111's focus on "the source of the pay or compensation." Beyond any question, the "source of pay or compensation" of the National Guard is the federal government. *Perpich v. Department of Defense*, ___ U.S. ___, 110 S. Ct. 2418, 2428 (1990). Nothing in *Davis* suggests that a group of federal employees (petitioners) may devise a claim of "discrimination" based upon favored treatment provided to other federally compensated employees (National Guard members).

Petitioners seek to escape the threshold barrier that no discrimination in source of pay can be found here by shifting focus to a kind of discrimination they suggest is inherent in the "closer connection" the National Guard has to the State than that of federal military personnel. Pet. 24. This "connection," so the argument goes, led to casting "federal service in an unfavorable light" and, "therefore," it was error to allow the defense of qualified immunity. *Id.*

Petitioners offer no authority for this remarkable series of conclusions. Most remarkably, they assert error in granting Secretary Powers the protection of qualified immunity despite their complete failure to identify the legal precedent she might have read that supports the linchpin of their argument: it violated petitioners' statutory or constitutional rights to tax them differently from other federal-compensated employees.

There is no tenable basis to contend that Secretary Powers could have known that enforcing a tax exemption for federally-paid National Guardsmen would violate any of petitioners' rights. Accordingly, there is no reason to allow the requested writ with respect to the claims of the Class B petitioners.

III. *Secretary Powers Did Not Violate Any Constitutional Rights by Enforcing North Carolina's Longstanding Statutory Procedure for Securing Tax Refunds.*

Petitioners foresee "more severe and long-term damage to society as a whole" and "a loss of taxpayers' confidence and trust" if "adequate post-deprivation procedures" are not made available to recover "illegally collected monies." Pet. 16. And, pursuant to petitioners' theory of righting these circumstances, Secretary Powers should be personally liable because she "impos[ed], just four days before the tax deadline, an unworkable 30-day statute of limitations within which to demand refunds." *Id.* 25 at II. This gloomy forecast stands on a misconstruction of the record and of the tax refund remedy actually provided by state law.

Like many other states, North Carolina had provided -- in a statute that has been on its books for 50 years -- that a taxpayer may not obtain an injunction against the collection of a state tax. *See* N.C.G.S. § 105-267 ("[n]o court of this State shall entertain a suit of any kind brought for the purpose of collecting any tax.") In lieu of providing a "remedy by injunction," this same statute also has required, for half a century, that any taxpayer seek recovery of a tax he regards as illegal by paying the tax and protesting such payment within 30 days of payment. Petitioners' frequent assertions that Secretary Powers "imposed" this refund demand requirement, much less that she imposed it as a "last-minute assertion" (Pet. 28), that she "crafted and implemented the 30-day bar as a method to avoid refunds" (*id.* 29), and that the 30-day requirement was "newly announced" (Pet. 10), all must fall to the ground.

Petitioners also attempt to draw on this Court's evaluation in *McKesson v. Div. of Alcoholic Beverages and Tobacco*,

___ U.S. ___, 110 S.Ct. 2238 (1990) to urge that North Carolina's refund procedure violated their due process rights. Pet. 25-26. On the contrary, *McKesson* has much to say *in favor of* North Carolina's statutory remedial scheme. For example, in *McKesson*, this Court explicitly recognized the salutary reasons to preclude a "predeprivation remedy" in this context:

> Allowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult.

Id. at 2250. Likewise, this Court declared: "[a] State might . . . provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint." *Id.* at 2254. Nowhere in their petition do petitioners confront these features of the *McKesson* analysis.

Further, the North Carolina statute (§ 105-267) now attacked in this petition, had been evaluated thoroughly by the state Supreme Court as recently as 1977 in a decision holding that the very refund procedure Secretary Powers enforced *must* be used to obtain a refund of unconstitutional taxes. *Coca-Cola v. Coble*, 238 S.E.2d 780, 783 (1977). Accordingly, it was only prudent for Secretary Powers to have applied the manifestly correct advice she received from the Special Deputy Attorney General on April 10, 1989 that --under *Coca-Cola* and the appropriate statues -- "the Secretary of Revenue *is not authorized* to refund any taxes imposed illegally . . . unless they were paid involuntarily, as indicated by a demand for refund made within 30 days of payment." JA 411-14 (emphasis added). Indeed, Secretary Powers' reliance on this advice from counsel, standing alone, indicates a strong foundation for the defense of qualified immunity. *Bier v. Fleming*, 717 F.2d 308, 313 (6th Cir. 1983), *cert. denied*, 465 U.S. 1026 (1987); *American Family Life Insur. Co. v. Teasdale*, 733 F.2d 559, 566 (8th Cir. 1984); *Stevens v. Sarrpete County*, 640 F. Supp. 376, 383 (D. Utah 1986), *aff'd*, 846 F.2d 76 (10th Cir. 1988).

For all of their dire predictions, petitioners do not confront, in any meaningful respect, the reality that Secretary Powers was applying the legislature's -- not her own -- judgment that a taxpayer wishing to contest the constitutionality of any tax he paid must pay the tax and protest that payment within 30 days. Moreover, petitioners may not take refuge in either the Department of Revenue bulletins they seek to invoke or in what they describe as the Attorney General's "objection" to the 30-day protest "because of plain unfairness." Pet. 27-28. First, and as explicitly recognized by the Court of Appeals, the bulletins "*clearly state in their preface* that they do not cover all phases of the law," (App. A 14a) (emphasis added), and caution taxpayers that the publications are "intended merely as a guide and that consideration must be given to all the facts and circumstances in applying these bulletins to particular situations." *See, e.g.*, J.A. 155. The bulletins petitioners select to rely upon just do not outline the procedure for recovery of an unconstitutional tax. The Court of Appeals provided a full answer to petitioners' contention when it observed:

> It would be difficult to convince qualified citizens to enter public service if they faced the possibility of paying damages because they followed the law or did not include in a general informational pamphlet all the statutory minutiae of a complex tax code.

App. A 14a.[6]

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6 Petitioners provide a lengthy quotation attributable to Respondent's Individual Income Tax Division Director with respect to his apparent advice that a three-year statute of limitations would protect a federal retiree's right to a refund as a result of the *Davis* decision. Pet. 9. The bracketed features of the selected quotation -- all supplied by petitioners -- do *not* appear, however, in the text of the document quoted from. *Compare* JA 493 *to* Pet. 9. When these bracketed features are deleted, the meaning of the quotation is changed significantly.

Although conceding (Pet. 7) that Secretary Powers issued a press release within two weeks of the *Davis* opinion (and within three days of receiving her counsel's advice that taxpayers must comply with the 30-day statutory demand feature), petitioners insist that this press release "was contrary to a personal letter" written on April 11, 1989 by the Attorney General himself. *Id.* 10. In fact, this letter described the effect of applying *Coca-Cola* to the *Davis* question only as one that "may suggest the need for further legislative action." Contrary to petitioners' suggestion, the Attorney General did not question the accuracy of the advice given by the Special Deputy Attorney General just the preceding day. Indeed, the Attorney General described "the holding in the *Coca-Cola* case [as] unambiguous," and observed -- with particular respect to the legal landscape respondent surveyed -- "[n]othing can be done about the decision by the North Carolina Supreme Court in *Coca-Cola* restricting the manner in which taxes paid under these circumstances can be refunded."

In summary, the Court of Appeals gave an apt response to petitioners' contention that Secretary Powers deprived them of an adequate remedy for unconstitutional taxation -- the second basis urged for granting the writ in this case:

> It cannot be that a state official who enforces a valid statute and who has in good faith sought legal advice from a state attorney general will nevertheless be found liable in damages for following that statute and that advice. *See Lemon v. Kurtzman*, 411 U.S. at 208-09; *Lucero v. Hart*, 915 F.2d 1367, 1371 (9th Cir. 1990).

App. A 14a.

CONCLUSION

The consequences or "stakes" presented by this case are surely significant, but not in the respect petitioners contend. Had the Court of Appeals failed to recognize the necessary role of qualified immunity on these facts, this Court would have faced not only a conflict with other Circuit Courts of Appeals, but a severe threat to any meaningful ability of a public official to "execut[e] the statutory duties [she] was appointed to perform." App. A 7a. "Government would come to a virtual standstill if executive officials concluded that their safest course of action was to ignore the laws of the state and to take no course of action for fear of liability." *Id.* 7a-8a.

This Court should deny the requested writ.

Respectfully submitted,

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